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74-6735

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

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JOHN R. STEGMANN,

Petitioner

-vs-

STATE OF NORTH CAROLINA,

Respondent

* * * * * * * * * * * * *

PETITION FOR CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * *

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INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	1
Question Presented	1
Constitutional and Statutory Provisions Involved	1
Statement	2
How the Federal Question Was Raised and Decided Below	4
Reasons for Granting the Writ	4
The Court should grant Certiorari to consider whether the imposition and execution of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendments to the Constitution of the United States.	4
Conclusion	5

TABLE OF CASES

Dillard v. North Carolina, 73-6875 (filed June 11, 1974)	4
Furman v. Georgia, US 238 (1972)	4
State v. Wadell, 282 NC 431, 194 SE 2d 19 (1973)	2

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PETITION FOR CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * *

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of North Carolina entered on April 1, 1974.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at _____NC_____, 213 SE 2d, 262 (1975) and is set out in Appendix A hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC Sec. 1257 (3), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether the imposition and execution of the sentence of death for the crime of rape under the law of North Carolina violates the Eighth or Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the General Statutes of North Carolina, Sec. 14-21. Punishment for Rape - Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of

unlawfully and carnally knowing and abusing a female child under the age of twelve years shall suffer death; provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.[1]

Sec. 15-187. Death by administration of lethal gas - Death by electrocution under sentence of law is hereby abolished and death by the administration of lethal gas substituted therefor.

Sec. 15-188. Manner and place of execution - The mode of executing a death sentence must in every case be by causing the convict or felon to inhale lethal gas of sufficient quantity to cause death, and the administration of such lethal gas must be continued until such convict or felon is dead; and when any person, convict or felon shall be sentenced by any court of the State having competent jurisdiction to be so executed, such punishment shall only be inflicted within a permanent death chamber which the superintendent of the State penitentiary is hereby authorized and directed to provide within the walls of the North Carolina penitentiary at Raleigh, North Carolina. The superintendent of the State penitentiary shall also cause to be provided in conformity with this article and approved by the Governor and Council of State, the necessary applicances for the infliction of the punishment of death in accordance with the requirements of this artic e.

STATEMENT

This is a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 1, 1975, affirming Petitioner's conviction and death sentence. Petitioner, John Richard Stegmann, was sentenced to die on May 16, 1974 in the Superior Court of Cumberland County, North Carolina upon conviction of the offense of rape. He was also sentenced to imprisonment for life upon conviction of the offense of kidnapping. Petitioner's sentence of death was imposed under North Carolina General Statute 14-21 as construed by the Supreme Court of North Carolina in State v. Wadell, supra, and related cases which are already before the court.

[1] As construed in State v. Wadell, 282 NC 431, 194 SE 2d 19 (1973), where the power of the jury to recommend life imprisonment was stricken by the court.

The State's evidence tended to show that Ruth Kendall, the prosecuting witness, was entering her car after leaving work on September 4, 1973 when the Defendant came upon her with a knife, forced her to slide over, and entered her car. The Defendant then held the knife on the victim as he drove the car away, and as the victim assisted him in shifting gears. The alleged abduction took place in a large shopping center at approximately 5:30 P. M.

According to the Prosecutrix the Defendant then drove to a park in the City of Fayetteville, North Carolina, where he took her to a secluded place in the woods and raped her. They then returned to the shopping center in which she worked where he left her. The evidence from the Prosecutrix further tended to show that there were many identifying marks on the Defendant, which made his subsequent identification in a line up very easy. He had tatoos on both arms (one with the names of his children) and he was missing his front teeth. He also told her a great deal about himself including the alleged fact that he had been arrested for rape in 1971, and had been tried and acquitted. The Defendant also related to the Prosecutrix that it was his intention to kill her in order to eliminate her as a witness against him, but that he eventually changed his mind.

The evidence for the Defendant was to the effect that he had first met the Prosecutrix two weeks before the date in question, and that she had given him her telephone number which was unlisted. He further testified that he had telephoned the Plaintiff a night or two before the alleged rape had occurred and that they had made a date to meet after work on September 4, 1973. His testimony further tended to show that she had gone with him willingly on that date and had willingly had intercourse with him.

The court instructed the jury that it could return the verdict of guilty or not guilty. The jury found the Petitioner guilty and the court thereupon sentenced him to death.

On April 1, 1975 the Supreme Court of North Carolina affirmed Petitioner's conviction and sentence to death with three Justices dissenting with regard to the death penalty. Chief Justice Susie Sharp has stayed execution of the judgment in order to allow time for these proceedings.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The Petitioner through counsel objected at trial to the entry of the judgment on the grounds which are alleged herein, and pursued his claim that the imposition of the death penalty under North Carolina law applicable to him, was unconstitutional. The Supreme Court of North Carolina rejected this contention on the merits citing its prior decisions. Justices Copeland, Sharp and Exum dissented from the imposition of the death penalty.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND EXECUTION OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In view of the many cases which are now before the court and present the identical issue to this one with reference to the death sentence the Petitioner would adopt the reasons for granting the Writ stated in the Petition for Certiorari in Dillard v. North Carolina, 73-6875 (filed June 11, 1974), and each of the issues set forth there:

a) Whether the decision of the North Carolina Supreme Court reinstating the death penalty in that State following Furman v. Georgia, US 238 (1972), is an impermissible evasion of the Furman holding;

b) Whether such a reinstatement of the death penalty by judicial decision violates the Eighth and Fourteenth Amendments commands of lawfulness in criminal punishments;

c) Whether perpetuation of arbitrary sentencing discretion in North Carolina's administration of the death penalty following Furman violates the constitutional rule of that case;

d) Whether the death penalty is so inconsistent with contemporary standards of decency to violate the Eighth and Fourteenth Amendments.

CONCLUSION

For the reasons cited above, the Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of North Carolina.

RESPECTFULLY SUBMITTED,

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June 18, 1975.

FILED

Justice Lake dissenting:

In my view there was prejudicial error in the trial in the admission of much of the character evidence and in the prosecutor's closing argument.

The testimony of several of the character witnesses in response to the district attorney's questions regarding the "basis" for earlier and properly expressed opinions constituted an improper effort by the State to prove, over objection of the defendant, the character of the prosecuting witness by specific acts and personal opinion. The witness Judson was allowed to testify that his opinion of the prosecuting witness' character was based upon "personal observation" and "upon my own seeing what she has done on her courage and her integrity." The witness Godwin testified that the prosecuting witness was in his Sunday School Class and the choir which he directed and that she regularly attended meetings every Wednesday night and every Sunday and that he could "find nothing wrong with her whatsoever." The witness Ledbetter said his opinion was based on his "own personal observation." The witness Heinburger said that her opinion was based on her own "personal observation of the prosecuting witness' reaction to things." The witness Riggin testified that she had had the prosecuting witness in her home on Christmas and her opinion of her character was based on "just personal observation." The witness Harris testified that "in her opinion the prosecuting witness is a fine Christian girl."

While the State was entitled to prove the character of the prosecuting witness both on the issue of her credibility and [illegible] as to whether she consented to the sexual intercourse, the rule of practice previously sanctioned by this Court and which should be adhered to by allowing the general reputation of the witness in the community where she lived. Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948); State v. [illegible], 280 N.C. 57, 184 S.E. 2d 707 (1971); State v. Stegman, 283 N.C. [illegible]

117 S.E. 778 (1923). See 1 Stansbury's North Carolina Evidence, Brandis Revision, § 110, pp. 220-227, and cases cited, where it is stated:

> "There are three methods by which a person's character might conceivably be proved: (a) by the opinion of those who know him, (b) by reputation, and (c) by specific acts. Where a character is directly in issue, it seems that all three of these processes are available. But when character is offered as evidence of a person's conduct on a particular occasion, the third method is not allowed at all, and the third is available only on cross-examination of the person whose character is in question. Therefore the standard method, and usually the only permissible method, of proving character is by reputation."

It is clear that the character of the prosecuting witness was not directly but only collaterally in issue. Character is directly in issue only when it is one of the ultimate facts to be proved or disproved in the case, for example, in actions for defamation where injury to reputation is one of the principal measures of damage or in prosecutions for the seduction of an "innocent and virtuous woman" under General Statute 14-29. 1 Stansbury's North Carolina Evidence, Brandis Revision, § 102. Where character evidence "is offered on the question of a witness' credibility, or as evidence that a party or third person did or did not do a particular thing" it is only collaterally in issue. 1 Stansbury's North Carolina Evidence, Brandis Revision, § 111, n. 5. A criminal defendant may offer evidence of his good character both on the question of his credibility if he testifies and on the question of his guilt whether or not he testifies, but his proof must be limited to his general reputation in the community. Nicholson v. United States, [illegible]; State v. Hellenich, 272 N.C. 510, 527, 158 S.E. 2d 826, 838 (1968); State v. Scantlin, 274 N.C. 568, 164 S.E. 2d 732 (1968). The Supreme Court of the United States, reviewing the general law on the subject, stated the rule as follows:

> "The witness may not testify about defendant's specific acts of misconduct or his particular conduct on a particular occasion or his mental and moral traits; nor can he testify that

> [illegible] character, [illegible] which the law permits [illegible] life has [illegible]." Michelson v. United States, 335 U.S. at [illegible], 93 L. Ed. at [illegible], 69 S. Ct. at 216.

This is also the North Carolina rule stated in State v. Dixon, 283 N.C. at 770, 197 S.E. at 701 as follows:

> "In North Carolina the testimony of a character witness is confined to the general reputation of the person whose character is attacked, or supported, in the community in which he lives. State v. Martin, 28 N.C., 329; State v. Perkins, 63 N.C., 129; State v. [illegible], 79 N.C., 703; State v. Thacker, 201 N.C., 551; State v. Coley, 214 N.C., 670, and numerous other cases cited. Reputation is the general opinion, good or bad, held of a person by those of a community in which he resides. This is eminently a matter of hearsay, based upon what the witness has heard or learned, not as to any particular acts, but as to the general opinion or standing in the community."

This same rule has previously been true with regard to the prosecution in a rape case. "The State may only prove her general character—it may not offer proof of particular traits of character." State v. Chandler, 231 N.C. 177, 183, 111 S.E. 2d 1, 15 (1959).

The reason for the rule limiting character evidence to general reputation is grounded not in logic but in policy and [illegible]. Michelson v. United States, supra; State v. Adams, 248 N.C. 611, 107 S.E. 657 (1957). Certainly the opinion of a witness who knows the person whose character is in question and prior specific acts of that person [illegible] highly relevant on the question of the person's character. We have said, however, that the rule prohibiting this kind of evidence "is both sound and salutary, for the reason that it obviates a mass of collateral questions which would inevitably prolong trials and invariably result in drawing the minds of the jurors far afield from the issues of the case." State v. [illegible], 283 N.C. at 770, 197 S.E. at 701.

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The holding of the majority, I fear, dangerously ignores the policy for limiting character evidence previously recognized by this and other courts. If the good character of the prosecuting witness in a rape case may be shown by the State through the personal opinion of witnesses who know her and by their revelation of her specific acts then the defendant must be allowed to attack her character by the same kind of testimony. The character of a defendant may likewise be proved. The majority opinion takes us back to what Justice Jackson in Michelson v. United States, supra, called "the frontier phase of our law's development, [where] calling friends to vouch for defendant's good character, and its counterpart—calling the rivals and enemies of a witness to impeach him by testifying that his reputation for veracity was so bad that he was unworthy of belief on his oath—were favorite and frequent ways of converting an individual litigation into a community contest and a trial into a spectacle." 335 U.S. at 480, 93 L. Ed. at 176, 69 S. Ct. at 220.

At Stegmann's first trial character evidence was not offered. The jury was unable to agree on a verdict. The improper admission of this evidence was clearly prejudicial to the defendant.

The district attorney's argument to the jury, set out verbatim in the majority opinion, to the effect that because of the rules of evidence the State was unable to present certain evidence to the jury and that these rules were for the protection of the defendant was improper. It permitted the jury to speculate on what might have been offered; it allowed the State to circumvent the rules of evidence and do indirectly what it could not do directly. The majority justifies the permissibility of the argument on the ground that it was invited by defense counsel and seems to say that it related solely to the question of whether the defendant had previously been arrested for rape. Defense counsel did, indeed, argue that there was no evidence that defendant had been arrested for rape—"just accusation." There was, however, evidence that he had been so arrested [illegible] the testimony of the prosecuting witness herself regarding

statements made to her by the defendant. The majority recognized that testimony of officers for the State that of the defendant "tended to show that he had in fact been arrested for a similar incident." Defense counsel, moreover, argued justifiably the failure of the State to offer into evidence the black underpants of the prosecuting witness. Whatever the district attorney's intent, the jury may well have understood from his argument that the State, somehow, was precluded by law from offering this evidence.

This kind of argument by the prosecution has been consistently condemned and held to be reversible error in cases from this and other jurisdictions. State v. Roach, 249 N.C. 69, 105 S.E. 2d 413 (1958) ("I tell you I could get a number of people, at least one hundred, to come in here and testify to his bad character"); Stanberry v. United States, 267 F. 2d 855 (5th Cir. 1959) ("I could probably have fifty people in here who would show that [defendant] isn't a good character"); Snipes v. United States, 255 F. 2d 165 (5th Cir. 1958)("He could have made thirty or forty counts in this thing, if you had wanted to be here a couple of weeks trying this lawsuit"); People v. Tallis, 111 Cal. App. 2d 653, 670-677, 245 P. 2d 633, 643 (1952) ("[Argument which] broadly implies the prosecution is possessed of much evidence tending to show guilt that has not been introduced, is erroneous and prejudicial"). It has been so held even where the argument was prompted by statements made by defense counsel and curative instructions were given by the trial court. State v. Hayle, 225 N.C. 210, 33 S.E. 2d 870 (1951); Mitchell v. United States, 251 F. 2d 710 (1st Cir. 1958). But see Commonwealth v. French, 170 Mass. 518, 233 N.E. 2d 155 (1970) ("[Y]ou have to use your imagination. There are many things in a court of law that can't be introduced." Held, improper but harmless because of adequate curative instructions.)

In State v. Hayle, supra, a drunk driving prosecution, defendant had argued the failure of the State to introduce into evidence a bottle of whiskey referred to in the testimony of [illegible]'s

witness. In his argument to the jury the district attorney explained why the whisky bottle had not been produced, stated that he had sent for the bottle and had it in a paper sack and was willing for it to be shown to the jury. Defendant objected and moved for an instruction that the jury not consider the argument. The motion was denied but in his instructions to the jury the trial judge told them to disregard that portion of the State's argument. We, nevertheless, because of this argument awarded defendant a new trial.

In Mitchell v. United States, supra, the government argued:

> "[T]here was a comment made by defense counsel, there is no evidence here that Mr. Mitchell knew of any of the other defendants. I submit to you it is an untrue comment. There are certain rules of evidence, his Honor will instruct you about, which the Government can introduce without prejudice to the case. I submit it is in that light you must consider that comment." 352 F. 2d at 710.

Upon objection the trial judge immediately instructed Government counsel to make no further argument of that nature. But counsel returned to say to the jury, "The issue is not, does he know these other defendants? If that were the issue, we would bring in an entirely different set of witnesses." Id. Those arguments were held to justify a new trial. The court said:

> "Decisions on the availability of waived 'evidence' are closely distinguishable. Gilliland v. United States, 5 Cir., 1951, 189 F. 2d 849; Rice v. United States, 4 Cir., 1951, 191 F. 2d 819, 822; cf. Caldwell v. United States, 1 Cir., 1950, 180 F. 2d 614, 617. Conceivably a simple caveat in this instance might have been cured by the court's sustaining the objection. The Government cannot go on, however, making such an issue and, finally, the court strike them out, and then claim they had no effect." Id.

In State v. Hoak, 227 N.C. 410, ____ S.E. 2d ____ (1946), we held it to be prejudicial error for the State to argue that a defendant's criminal record cannot be offered in evidence but not in the transition on the ground, however, that the remark was an objectionable comment upon the failure of the defendant to testify in his behalf.

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Bingham, through counsel, promptly objected to the prosecutor's argument here complained of and moved for a mistrial. His objection was overruled and motion denied. No curative instructions were attempted. This constituted error, in my opinion, entitling defendant to a new trial.

The evidence in this case is simply conflicting. The question of guilt hangs largely on the credibility which the jury accords to the prosecuting witness and to the defendant. I am unable to say that the improper character evidence and the improper portions of the State's closing argument constituted error which was harmless beyond a reasonable doubt.

I also dissent from the imposition of the death sentence for the reasons stated in my dissenting opinion in State v. Williams, 288 N.C. 422, ____ S.E. 2d ____ (1975).

No. 38 - State v Stegmann

COPELAND, Justice dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in State v Williams, 286 N.C. 422 at 437, _____ S.E.2d _____ (1975).

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IN THE OFFICE OF
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NORTH CAROLINA

State v. Stegmann - No. 33

Chief Justice Sharp dissents as to the death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in her dissenting opinion in State v. Williams, 286 N.C. 422, 434, ____ S.E.2d ____, ____ (1975).

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APR 14 1975
OF
COURT
CAROLINA

IN THE SUPREME COURT OF NORTH CAROLINA SPRING TERM 1975

STATE OF NORTH CAROLINA

FILED
APR 14 1975
IN THE OFFICE OF
CLERK SUPREME COURT
OF NORTH CAROLINA

v No. 38 - Cumberland

JOHN RICHARD STRICKLAND

Appeal by defendant from judgments of Canady, J., 13 May 1974 Criminal Session, Cumberland Superior Court.

Defendant was tried upon bills of indictment proper in form charging him with (1) kidnapping and (2) raping Ruth O'Leta Kendall on 4 September 1973 in Cumberland County.

Ruth O'Leta Kendall, a twenty-six-year-old married woman, testified that on 4 September 1973 she worked her normal hours of 8:30 a.m. to 5:00 p.m. at the Aetna Finance Company office located in the K-Mart Shopping Center on Bragg Boulevard in Fayetteville. Upon leaving work about 5:15 p.m., she made a few purchases in the grocery store, returned to her car, unlocked and opened the door on the driver's side, and sat down on the seat with her right leg in the car and her left foot and leg outside. The right door to the car was locked and could only be unlocked from the outside because the plastic button on the inside was broken off. While in that position and in the act of placing her groceries on the seat, a man shoved a knife in her ribs and told her to move over. "He told me to keep quiet and move over or he would use the knife. That if I did keep quiet he wouldn't hurt me."

Mrs. Kendall further testified that she moved over and the man got under the wheel. He required her to keep her hands on her lap while he kept his right arm around her with the knife to her side. It was a straight shift car which he steered with his left hand while she, at his command, changed gears as necessary. The man took her out Bragg Boulevard and into a remote section of Campbell's Park where he stopped the car. He then forced Mrs. Kendall to accompany him on foot into the woods. There, after forcing her to disrobe, he raped her.

After putting on their clothes, Mrs. Kendall inquired if she would be taken back to the K-Mart and the man said, "I can't let you live because you can recognize me," adding that rape was a capital offense and that he couldn't afford to go through that. He told Mrs. Kendall he had been tried for rape in 1971 and "beat the rap" and couldn't go through that again. He told her he had spent time in jail and in a mental hospital; that he had children he had to support; that she could identify him by his tattoos. Mrs. Kendall observed that the man's front teeth were missing and that a tattoo on his left forearm said "God Bless My Family" and had four names, including the name Sharon. On his right upper arm was an Airborne-type tattoo. He was wearing a T-shirt, fatigue pants, and combat boots. The man pushed Mrs. Kendall through the underbrush until they came to the Cape Fear River. He asked her if she could swim and told her to choose between the knife and the river. She started for the river and he pulled her back and eventually took her back to the car.

On the way back to K-Mart he wanted to know her name and she told him. He said he wanted her telephone number, and Mrs. Kendall wrote it on a piece of paper and gave it to him. He told her that he wanted to have an affair with her--"he wanted to call me up and meet me later. I told him that I would do anything he wanted; he still had the knife and I was still petrified."

Upon arrival at the K-Mart parking lot the man talked to Mrs. Kendall for an additional ten or fifteen minutes, then got out of the car and told her to go straight home and not look back. Mrs. Kendall drove away and noticed a white car following her until she turned into the street where she lived.

Mrs. Kendall immediately told her husband what had occurred. Her clothes were dirty and wet and had mud, debris and pine straw on them. The family doctor was called and the police were notified.

When the police arrived at her home she told them the whole story and gave a description of the man including information about

the tattoos, the two missing front teeth, and the color of his hair. She also told the officers that her assailant said "he had beat a case like this in '71 where he had assaulted another lady and that he had spent time in jail and that he had spent time in a mental hospital."

The officers consulted their files and ascertained that the defendant John Richard Stegmann fit, in minute detail, the description given by Mrs. Kendall. The police records further showed that defendant had been charged with rape in 1971 and acquitted.

Defendant was arrested and on the following day Mrs. Kendall identified him in a lineup.

Defendant offered evidence and testified as a witness in his own behalf. He said he was twenty-four years old, married, and had three children named Johnny, Donny and Sharon. He testified he first met Mrs. Kendall in the K-Mart Snack Bar approximately two weeks before he was arrested. The place was crowded and he asked Mrs. Kendall if he might sit at her table where she was eating lunch and she consented. He introduced himself and she told him her name. He told her he was in the Army, married and had children. He asked her for her telephone number and she gave it to him there in the K-Mart Snack Bar. The number was 887-1700 and he put it in his wallet. On 3 September 1973 he called Mrs. Kendall and in a one minute conversation they agreed to meet the following day when she got off work. Accordingly, he met her on 4 September 1973 as she came out of the grocery store at the K-Mart Shopping Center. "I walked over to her and took the bags she was carrying and carried them to her car. She then got into her car and I got in, too, and I drove away."

The defendant further testified that they drove to Clark's Park, went down the path that leads to the river to an area in the woods where they undressed and had sexual relations. It was drizzling at the time. While undressing "everything fell out of one of the pockets in my pants," including the knife offered in evidence, and Mrs. Kendall

helped pick the items up. Defendant said he and Mrs. Kendall then dressed and drove back to the K-Mart Shopping Center where they sat and talked for fifteen or twenty minutes. "I then got out of the car and left. She drove off."

Defendant emphatically denied that his small pocket knife was ever open, or that he ever threatened Mrs. Kendall, or that he ever told her he had been previously charged with rape in 1971 and beat the rap. He admitted that his front teeth are missing and that he has tattoos on both arms, one an Airborne-type tattoo and the other with "God Bless My Family" and four names on it--Sandra, Sharon, Johnny and Donny.

Dr. Albert Stewart, Jr., testified that he saw Mrs. Kendall on 4 September 1973 at which time she told him she had been raped. She appeared to be frightened but there was no evidence of any bodily injury. Examination disclosed twigs, bits of debris, leaves and dirt adhering to her back and in the vaginal area. There were no scratches, cuts or bruises on her body and examination of her privates revealed no cuts or bruises or lacerations of any kind.

The arguments were transcribed and constitute part of the record on appeal. Pertinent portions of the district attorney's argument which are assigned as error will be narrated in the opinion.

Defendant was convicted of both charges and appeals from a life sentence for the kidnapping and a death sentence for the rape.

KENNETH CLUCKMAN, Attorney for defendant appellant.

JAMES H. CARSON, JR., Attorney General, and JAMES E. MAGNUM, JR., Assistant Attorney General, for the State of North Carolina.

BURKINS, Justice:

The trial court admitted over objection the testimony of fourteen character witnesses offered by the State to show the good character and reputation of the prosecuting witness. Defendant's second and third assignments of error are based upon admission of this testimony. Following is a brief narration of the evidence in question.

Roger Frazee, manager of Aetna Finance Company where Mrs. Ruth Kendall had been working for fourteen months, testified that he knew her character and reputation in the community in which she lived and that it was outstanding.

Gilda Smith testified she had known Ruth Kendall for over four years, knew her character and reputation in the community in which she lived and that it was "very good, excellent."

Reverend Clarence L. Hopkins testified he had known Ruth Kendall for about ten years, knew her character and reputation in the community in which she lived, and that it was outstanding. When asked to state on what he based his opinion, he replied: "As a pastor and counseling with other members of the church and their counseling with me and statements made about her and also in and out of the church I know her."

Major Darryl C. Judson testified he had known Ruth Kendall for about eight years, knew her character and reputation in the community in which she lived, and that it was outstanding. When requested to state the basis for his answer, he replied: "I base this upon personal observation, talking with friends and conversation with other people and upon my own seeing what she has done on her courage and her integrity."

Will R. Godwin testified he had known Ruth Kendall for ten or twelve years, knew her character and reputation in the community in which she lived, and that it was very good. When asked to state the basis for his testimony, he replied: "I am her Sunday School teacher and I am the director of the choir in which she sings. She is there every Wednesday night and every Sunday and I can find nothing wrong with her whatsoever. She is a very fine girl."

Eugene Arthur Ledbetter, a soldier in the United States Army, testified he had known Ruth Kendall between ten and twelve years, knew her character and reputation in the community in which she lived, and that it was excellent. When asked to state the basis for that

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opinion, he replied: "I base this on my own personal observation and discussions with other church leaders regarding positions of leadership that have been filled with the church and I know her reputation as being the finest a woman can have."

Fancy Cain Porter testified she had known Ruth Kendall approximately twelve years, knew her character and reputation in the community in which she lived, and that it was outstanding. When asked what she based that opinion on, she replied: "I have been knowing her approximately twelve years and personal contact. And working with her in the church and choir."

Roy A. Parker testified that he knew Ruth Kendall; that her character and reputation in the community in which she lived was very good and that he based his opinion upon talking with his friends and neighbors in the church and in the community and as a personal observation.

Mitchell Reinburger testified that he knew the character and reputation of the prosecuting witness in the community in which she lived and that it was outstanding; that his opinion was based on his personal knowledge of her and the opinions of his friends.

Catherine Reinburger testified that she knew the character and reputation of Ruth Kendall in the community in which she lived and that it was excellent; that her opinion was based on the fact that she had known Mrs. Kendall for three and one-half years, had been involved in activities with her and her husband, and from talking with friends and acquaintances.

Ann Higgin testified that she knew the character and reputation of Ruth Kendall in the community in which she lived and that it was excellent; that her opinion was based on living in the community with her when she was growing up, going to church with her, and having Mrs. Kendall in her home at Christmas time.

Tony Cinaglia testified that he knew the general character and reputation of the prosecuting witness in the community in which she lived and that it was very good; that his opinion was based on

being with Mrs. Kendall and her husband on numerous occasions and through friends in the community and from knowing her personally.

Alden Ernest Peace testified that he knew the character and reputation of Mrs. Kendall in the community in which she lived and that it was outstanding; that his opinion was based on his personal acquaintance with Ruth Kendall and her husband "and through personal acquaintances with neighbors and church members."

Mrs. Roland Harris, Jr., testified that she knew the general character and reputation of the prosecuting witness in the community in which she lived and that it was good; that her opinion was based on her own personal observation. "The witness testified that the prosecuting witness and her husband had been in the witness' home several times during the time they were dating and since then and the witness further testified that in her opinion the prosecuting witness is a fine Christian girl."

It is the general rule in this State that a sustaining or impeaching character witness must first qualify himself by indicating whether he knows the general reputation or character of the person. Johnson v Massengill, 280 N.C. 370, 186 S.E. 2d 188 (1972); State v Willis, 248 N.C. 142, 88 S.E. 2d 283 (1955); State v Bowen, 220 N.C. 691, 30 S.E. 2d 748 (1942); State v Colson, 193 N.C. 230, 136 S.E. 730 (1927); State v Steen, 183 N.C. 738, 117 S.E. 788 (1922); 1 Stansbury's North Carolina Evidence, § 114 (Brandis Rev. 1973).

When thus qualified, the character witness may then indicate, of his own accord or by prompting from counsel, what that general reputation is. State v Knox, 218 N.C. 79, 195 S.E. 72 (1938); State v Costello, 212 N.C. 306, 193 S.E. 405 (1937); State v Manor, 198 N.C. 47, 141 S.E. 468 (1929); Edwards v Price, 162 N.C. 243, 78 S.E. 145 (1913); State v Emery, 110 N.C. 1177, 24 S.E. 414 (1892).

Chief Justice Stacy in State v Hicks, 200 N.C. 533, 197 S.E. 681 (1931), states the rule for qualifying a character witness and eliciting character testimony from him in these words:

> "It is the rule in this State that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer it in the negative, he should be stood aside without further examination. If he reply in the affirmative, thus qualifying himself to speak on the subject of general reputation and character, counsel may then ask him to state what it is. This he may do categorically, i.e. simply saying that it is good or bad, without more, or he may, of his own volition, but without suggestion from counsel adduced on the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices."

This procedure was followed in the examination of witnesses Roger Bruce and Gilda Smith. In the examination of the remaining twelve witnesses, however, the district attorney added the question: "On what do you base your opinion?" Defendant contends this question spawned expressions of personal opinions and narrations of specific acts relating to Ruth Kendall's good character in violation of the rule that character may not be shown by the opinion of the character witness or by specific acts of the person whose character is in question. See Johnson v Massengill, 280 N.C. 376, 186 S.E. 2d 188 (1972).

Although unnecessary and inaptly phrased, the additional question and the answers thereto tended to show the foundation for the character evidence given by the witnesses. A strong or weak foundation for the testimony of a witness aids the jury in determining the weight it will give that testimony. State v Young, 210 N.C. 422, 187 S.E. 801 (1936); Moss v Knitting Mills, 198 N.C. 644, 153 S.E. 255 (1930); 2 Wigmore, Evidence § 655 (3rd Ed. 1940). Thus the question was properly permitted, and we perceive no prejudice from either the question or the responses. State v Minish, 217 N.C. 339, 8 S.E. 2d 474 (1940).

In the cross-examination of Ruth Kendall, defense counsel attempted to elicit testimony tending to show that she consented to the intercourse with defendant and fabricated the alleged rape because she was afraid her husband would learn the truth concerning

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her adulterous with defendant. The questions implied that Mrs. Kendall had willingly engaged in an adulterous act and then sought to conceal it by false testimony on direct examination. In that setting, the district attorney was entitled, while making out the State's case in chief, to offer evidence of her good character and reputation to sustain and strengthen her veracity and virtue. Inglo v Transfer Co., 271 N.C. 270, 156 S.E. 2d 235 (1967); Lorbacher v Talley, 256 N.C. 256, 123 S.E. 2d 477 (1962); State v Hooks, 228 N.C. 669, 47 S.E. 2d 234 (1948); State v Litteral, 227 N.C. 337, 42 S.E. 2d 84, cert. denied 332 U.S. 764, 92 L.Ed. 349, 68 S.Ct. 69 (1947); State v Bethea, 186 N.C. 22, 118 S.E. 800 (1923); 1 Jones on Evidence § 4:37 (6th Ed. 1972); 1 Stansbury's North Carolina Evidence § 50 (Brandis Rev. 1973); 4 Wigmore, Evidence § 1104 (Chadbourn Rev. 1972); 29 Am. Jur. 2d, Evidence § 342 (1967). Moreover, "the character of the complainant in rape may, it seems, be shown as bearing on the question of consent." 1 Stansbury's North Carolina Evidence § 105 (Brandis Rev. 1973); State v Crumpler and Jolly, 251 N.C. 177, 111 S.E. 2d 1 (1959), cert. denied 362 U.S. 917, 4 L.Ed. 2d 738, 80 S.Ct. 670 (1960); State v Hairston, 121 N.C. 579, 28 S.E. 492 (1897); State v Daniel, 87 N.C. 567 (1882); State v Jefferson, 26 N.C. 305 (1843). In every criminal prosecution a defendant may offer evidence of his good character and have it considered as substantive evidence in his favor. On the same theory, in a prosecution for rape, where the credibility of the prosecutrix is attacked either by evidence or by questions on cross-examination insinuating that she consented to sexual relations with the defendant, the State is entitled to offer evidence of the good character of the prosecutrix. The defense of consent is a charge that the prosecutrix has, under oath, falsely accused a man in a matter involving his life or death. The State, therefore, may put in evidence any circumstance tending to lessen the likelihood that she is guilty of such criminal and iniquitous conduct. See 1 Stansbury's North Carolina Evidence §§ 104 and 105 (Brandis Rev. 1973). In situations where the defendant does not question the fact of rape but denies that he is the guilty party, the character of the prosecutrix is not directly involved in the issue.

We note that each character witness categorically stated that Ruth Kendall's character and reputation was "outstanding," "very good," or "excellent." Then in response to the additional question the

witnesses indicated that their testimony was based on association, observation and discussion with Ruth Kendall and her associates. Eight of the witnesses (Hopkins, Judson, Ledbetter, Parker, Mitchell, Reinhuzger, Cimaglia and Pease) testified they had gained knowledge of Ruth Kendall's reputation through personal observation and by talking with church members, friends, neighbors, personal associates, and other members of the community. The testimony of each witness, when taken as a whole, indicates that the witness was in a position to observe Ruth Kendall and to gain knowledge of her general reputation in the community from those knowledgeable of that reputation. Such testimony, as well as the length of time each witness had known Ruth Kendall, was admissible to show the foundation for their estimate of her character. State v Carden, 290 N.C. 484, 168 S.E. 808, cert. denied 290 U.S. 662, 80 L.Ed. 1402, 88 S.Ct. 900 (1938).

The fact that several of the witnesses attended the same church as Ruth Kendall and based their testimony on what had been heard in the church community did not render the testimony inadmissible. Evidence of Ruth Kendall's general reputation among the members of the church community was competent. State v McEachern, 283 N.C. 57, 194 S.E. 2d 787 (1973). And the number of character witnesses who were permitted to testify rested in the sound discretion of the trial court. State v Wright, 274 N.C. 380, 163 S.E. 2d 897 (1968); Wells v Dissette, 268 N.C. 774, 147 S.E. 2d 210 (1966); see Annot., Propriety and Prejudicial Effect of Trial Court's Limiting Number of Character or Reputation Witnesses, 17 A.L.R. 3d 827 (1968). The number permitted in this case by the trial judge is understandable since Mrs. Kendall's character was under attack.

Only the testimony of Mrs. Roland Harris, Jr., appears to be grounded solely on personal opinion and thus inadmissible. Error in admitting her testimony is harmless since Ruth Kendall's good reputation was well established by other admissible evidence. State v Killian, 173 N.C. 798, 92 S.E. 499 (1917); accord, United States v Neal, 362 F. Supp. 970 (E.D. Pa. 1973), aff'd 475 F. 2d 661 (3rd Cir. 1973).

We conclude, for the reasons stated, that defendant's second and third assignments of error are without merit.

Assignments of error five, six and eleven concern error in the admission of evidence tending to show defendant had been arrested four days in 1971. One question of law is presented under the three assignments, so we consider them together.

Ruth Kendall testified on direct examination that defendant told her "that he had had a lady in 1971 and that he had done the same thing to her that he had done to me and he had beat the rap, and that he had spent time in jail for it." When the police came to her home, she told them what defendant had said "concerning 1971." She said she did not know defendant's name at that time and the name Stegmann was not mentioned by anyone. Defendant made no objection and took no exception to the introduction of her testimony.

Defendant Stegmann took the stand and testified he did not tell Ruth Kendall that he had previously been charged with rape. On cross-examination he stated that Mrs. Kendall had lied about the statement.

On the direct examination of Deputy Sheriffs Conerly and Martin, the district attorney inquired whether the officers had reviewed their files as a result of Ruth Kendall's description of the suspect and the statement concerning his arrest for rape in 1971. The witnesses in substance testified that such a review was made and, as a result, the defendant's name was turned over to Detective Merritt of the Fayetteville City Police Department. Detective Merritt testified that he received defendant's name from the sheriff's department and that defendant was arrested. Objections and exceptions to the questioning and testimony of these witnesses constitutes defendant's sixth assignment of error.

In a series of questions propounded on cross-examination, the district attorney asked defendant, inter alia, whether he knew Linda Hoffman, whether he raped her in September 1971 and used a knife in the process, whether he had sexual intercourse with her, and whether

he knew Officer House who was sitting in the courtroom. Defendant responded that he had known Diane Hoffman for approximately five or six hours and admitted having sexual intercourse with her. However, he denied using his knife and raping her. He stated that he knew Officer House. Objections and exceptions to these questions and testimony constitute defendant's sixth assignment of error.

During argument to the jury the district attorney recapitulated the above testimony, stating at one point that it showed the steps leading to the identification and apprehension of defendant. At another point in his argument he invited the jury to "draw the reasonable inferences" from it. Objections and exceptions to such argument constitutes defendant's eleventh assignment of error.

Defendant argues that one of the major thrusts of the State's case was directed towards proving and arguing that defendant had a prior arrest for rape. He contends such testimony and argument should have been excluded under authority of State v Williams, 279 N.C. 663, 185 S.E. 2d 174 (1971).

In Williams the defendant was tried for robbery. On cross-examination he was asked whether he was under indictment for other unrelated robberies. Overruling a line of cases to the contrary, this Court held that "for purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is then on trial." The Court also held, a fortiori, that "for purposes of impeachment, a witness, including the defendant in a criminal case, may not be cross-examined as to whether he has been arrested, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been arraigned for such unrelated criminal offense." In conclusion, Chief Justice Bobbitt, writing for the Court, defined the limits of that decision:

"We are not at present concerned with the general rule that, in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has been convicted of another distinct, independent, or unconnected offense, nor with any of the well recognized exceptions to that rule. See State v. Adams, [citation] (1954), and cases cited. Evidence which is competent under any of the well recognized exceptions to said rule is competent as substantive evidence. We are concerned only with questions which are permissible on cross-examination solely for the purpose of impeachment.

"It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking pertinent questions concerning collateral matters relating to his criminal and degrading conduct. State v Patterson, 24 N.C. 346 (1841); State v Davidson, 67 N.C. 119 (1872); State v Rose, 270 N.C. 510, 513, 155 S.E. 2d 243, 246 (1967). Such questions related to matters within the knowledge of the witness, not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith."

The Williams decision does not affect the general rule that in a prosecution for a particular crime the State cannot offer evidence tending to show the accused committed another distinct, independent or separate offense. See State v Jones, 270 N.C. 33, 153 S.E. 2d 820 (1971); State v McClain, 240 N.C. 171, 81 S.E. 2d 364 (1954). Nor does Williams displace the many recognized exceptions to that general rule. See State v McClain, supra; State v Harris, 220 N.C. 667, 20 S.E. 2d 283 (1942); State v Wright, 136 N.C. 617, 48 S.E. 1049 (1904).

When the general rule excluding evidence of other offenses is stated in terms of relevancy of evidence, the rule becomes absolute. Professor Stansbury correctly states the rule as follows:

"This is commonly supposed to be a somewhat difficult and complex field, marked out by a general rule of exclusion and a series of exceptions. It is submitted, however, that the rule is in fact a simple one which, when accurately stated, is subject to no exceptions: Evidence of other offenses is inadmissible on the issue of guilt if the only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury's North Carolina Evidence 91 (Brandis Rev. 1973); accord, State v Coffey, 279 N.C. [illegible], 182 S.E. 2d 419 (1971), cert. denied 404 U.S. 1062, 92 S.Ct. 753, 30 L.Ed. 2d 753 (1972); State v. Shields, supra at 110-11, 83 S.E. 2d at 659 ("The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is

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sought to be introduced," quoting State v Creecy, 101 S.C. 212, 4 S.E. 2d 1).

Under this rule evidence tending to show that defendant had been arrested for rape in 1972 is admissible if it is relevant to some legitimate issue in the trial other than defendant's character or disposition for crime. We find it admissible to show identification and to corroborate the testimony of Ruth Kendall.

Ruth Kendall testified defendant told her he had committed a similar act in 1972 for which he spent time in jail, but that he ultimately "beat the rap." The subsequent questioning and testimony of the officers and defendant, which tended to show that he had in fact been arrested for a similar incident, was obviously relevant to show that defendant was the person who had raped Ruth Kendall and made the statement concerning a similar offense in 1972. State v Perry, 276 N.C. 566, 169 S.E. 2d 833 (1969); see also State v Shute, supra; State v Williams, 270 N.C. 703, 174 S.E. 2d 593 (1970), aff'd on other grounds 403 U.S. 943, 29 L.Ed. 2d 858, 91 S.Ct. 2288 (1971), and cases cited therein.

Even so, defendant contends that the issue of identification was never really in issue since the defense was based on consent rather than misidentification. Nevertheless, his plea of not guilty put in issue every material element of the State's charge against him. State v Williams, 277 N.C. 688, 178 S.E. 2d 473 (1971); State v Courtney, 240 N.C. 447, 183 S.E. 2d 801 (1958). Regardless of the development at the previous trial or defendant's testimony in the trial now under consideration, it was incumbent on the prosecution to prove that defendant committed the alleged crime. 23 Am. Jur. 2d, Rape § 53 (1979). The district attorney was not required to speculate as to possible defenses before defendant put on evidence.

Moreover, the evidence tended to confirm the statements that defendant had committed a similar offense in 1972 which would explain that Ruth Kendall did not misunderstand her testimony concerning the statement. The evidence strengthened what Ruth Kendall had said,

all therefore was admissible for corroboration purposes. See State v Case, 253 N.C. 238, 116 S.E. 2d 779 (1960), cert. denied 365 U.S. 837, 5 L.Ed. 2d 707, 81 S.Ct. 747 (1961); State v Hayford, 238 N.C. 267, 77 S.E. 2d 634, cert. denied 343 U.S. 940, 96 L.Ed. 445, 72 S.Ct. 38 (1952); State v Horton, 267 N.C. 333, 18 S.E. 112 (1966).

Even assuming arguendo that the evidence served no relevant purpose and was inadmissible, there was no prejudicial error. On both direct and cross-examination Ruth Kendall testified that defendant told her he had committed a similar offense and "beat the rap." Since defendant made no objection to her testimony, his subsequent objections to evidence of the same or like import were of no avail. State v Van Landingham, 280 N.C. 633, 187 S.E. 2d 383 (1972); State v Davis, 282 N.C. 107, 191 S.E. 2d 681 (1972); State v Barrett, 272 N.C. 376, 158 S.E. 2d 4 (1967); State v Wright, 270 N.C. 135, 153 S.E. 2d 833 (1967). Assignments of error five, six and eleven are overruled.

Assignments of error eight and ten are directed to the district attorney's argument to the jury.

Assignment eight alleges error in the following portion of the argument, which reads:

> "In criminal law we have certain rules, laws, statutes and all of these are designed to protect the rights of defendants. They have been brought about by custom from England, practices that have been designed through history and building up to the present day, laws that we work with. Now under these rules of evidence, there is certain evidence that can't be presented to you, for the protection of the defendant.
>
> Now, that is just the law, yet, even in view of these rules and these laws, argument can be made to you, why wasn't this or that brought in. Well, that seems inconsistent to you, but that is the law. I might could not present evidence, and the defense attorney can stand up and say why didn't we, and he knows that it was for the protection of his defendant, that evidence didn't come in, even some law--
>
> ATTORNEY CLEMMAN: Objection. (The Judge is not in the Courtroom).
>
> The law is clear and I can ask a defendant on cross examination about prior convictions, specific instances, that is the law of the case, here in North Carolina. The law is equally clear that if the defendant denies that, I can't put on independent evidence of it.
>
> ATTORNEY CLEMMAN: Objection."

defendant's objections to this portion of the argument and a motion for mistrial grounded thereon were denied.

Numerous cases hold that the argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases. E.g. State v Monk, 280 N.C. 509, S.E.2d (1972); State v Brandon, 241 N.C. 650, 86 S.E.2d 424 (1955); State v Bonds, 230 N.C. 720, 55 S.E.2d 450 (1949); State v Little, 228 N.C. 647, 46 S.E.2d 848 (1947).

It is the duty of the prosecuting attorney in all phases of the trial to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction. See State v Monk, supra; State v Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971), vacated on other grounds, 408 U.S. 939, 33 L.Ed.2d 761, 92 S.Ct. 2873 (1972); 23A C.J.S., Criminal Law § 1001 (1961).

Such is the case here. Both counsel for defendant and the district attorney presented forceful arguments to the jury. Defense counsel repeatedly argued that there was no evidence that defendant was arrested for rape in 1971, just accusations. Defense counsel's remarks invited the district attorney's response indicating why he had not introduced such evidence. Although we do not concede, as the district attorney apparently thought, that the stated rule precluded the actual introduction of such evidence for relevant purposes other than impeachment, we perceive no error in the trial court's ruling upon the district attorney's responsive argument. State v Dolph, 283 N.C. 333, 196 S.E.2d 223 (1973); State v Knotts, 203 N.C. 144, 88 S.E. 972 (1914); 75 Am. Jur. 2d, Trial § 233 (1974). Defendant's eighth assignment is overruled.

Defendant's tenth assignment of error is also directed to portions of the district attorney's argument. Exceptions 33, 34, and 37 are grouped under this assignment and relate to the following excerpts from the argument:

"Very frankly, I want you to be bothered. I think we all are bothered by this. I think it is disgusting. I think it is the most horrible thing that can happen to anybody in this world." Objection. Overruled. Exception No. [illegible].

* * * *

"She has been accused of taking up with this attorney after a fifteen minute conversation and running off to Ohio and having intercourse on a pile, on a wet day, dirt. I am not going to call the name what you would name it, if it somebody that would do that, but you know what it is and that is what he is saying she did. She has been accused of being a liar. Her character has been smeared in about the most lowly manner that can be done to anybody." Objection. Overruled. Exception No. 61.

"And I ask you--most of you men can probably not understand it, because you can't be placed in the woman's place, completely--but let me ask you, how would you feel if you were called the things in this Court--" Objection. Exception No. 62.

"--that she was called?" Objection. Overruled. Exception No. 63.

"And they said on top of all this, and this really tops it all, that she can just turn on and off the tears when she wants to. By gosh, after what she has gone through and what she was being called. And there is no protection from what is printed or what is published in a trial of a case. Everybody talks about it. But look what happened. She is scarred--not physically, there is no scarring on the outside, but she is scarred mentally. She has got to live with it. She has not to live with this horrible experience the rest of her life." Objection. Overruled. Exception No. 64.

* * * *

"The defendant Stegmann feels, as has been shown you, that he can force his way on any woman. He is going to do what he pleases, regardless of whose rights he violates. He is above the law and that is the way he sits here right now, 'I am above the law. I am going to thumb my nose at you.'" Objection.

"COURT: Proceed to some other form of argument, Mr. District Attorney." Exception No. 67.

In presenting the State's case, the prosecutor must "view the whole transaction as it was." He has much latitude in the language and manner of presenting his side of the case "consistent with the facts in evidence." State v Westbrook, supra; 23A C.J.S., Criminal Law §§ 1041 and 1066 (1961).

The prosecutor is entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. State v Conner, 244 N.C. 200, 92 S.E. 2d 666 (1956).

Hester v Millard, 241 N.C. 253, 84 S.E. 2d 899 (1954); State v Carter, 233 N.C. 70, 62 S.E. 2d 509 (1950). On the other hand, he may not place before the jury incompetent, irrelevant and prejudicial matters and may not "travel outside the record" by injecting into his argument facts of his own knowledge or other facts not included in the evidence. State v Noell, supra; State v Corbett, 244 N.C. 497, 94 S.E. 2d 468, 97 A.L.R. 2d 233 (1956); State v Phillips, 240 N.C. 610, 83 S.E. 2d 788 (1954); State v Bockery, 232 N.C. 222, 77 S.E. 2d 664 (1953); State v Buchanan, 216 N.C. 703, 6 S.E. 2d 531 (1940).

The fact that the sympathy or prejudice of the jury may be aroused by the argument of counsel does not render the argument improper when it is legitimate and based on competent evidence. Only comments calculated to inflame unduly the passions and prejudices of jurors are improper.

> "Ordinarily, legitimate arguments based on competent evidence in the case are not rendered improper by the fact that they incidentally stir the sympathies and prejudices of the jury, and, a fortiori, do not constitute error where they are relatively of little importance, and have no tendency to create sympathy or prejudice greater than the facts in evidence create, or where they are within the permissible bounds of fair comment and are not in fact inflammatory to the extent of constituting misconduct by the prosecuting attorney. On the other hand, comments calculated unduly to create, arouse or inflame their sympathies, prejudices, or passions to the detriment of the accused are improper.
>
> * * * *
>
> On the other hand, it has been held not to be an improper appeal to the sympathies and prejudices of the jurors to denounce crime in strong terms, or to characterize the crime charged or point out its enormity, heinousness, and consequences; but comments to the effect that the crime was of such a nature as might well have aroused relatives of the injured person or citizens generally to take the law into their own hands are uniformly held improper." 23A C.J.S., Criminal Law § 1203 (1962).

Applying these principles to this case, the district attorney's argument is within permissible bounds of fair debate, except the portion to which exception No. 27 is addressed. That portion was improper and the trial judge stopped it before any prejudice, if any, was created by the facts themselves, was done. See State v Lawrence, 243 N.C. 350, 90 S.E. 2d 724 (1955). Assignment number ten is overruled.

Assignments one, seven and nine are not discussed in defendant's brief and are therefore deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 284 N.C. 743, 210 (1974).

The witness Alden Ernest Pease testified that Ruth Kendall's character and reputation in the community in which she lived was outstanding. On cross-examination he testified that he was a special investigator with an intelligence unit involving seven states but, by reason of the confidential nature of his work, could not reveal details concerning the type of work involved or the identity of his employer. Defendant's fourth assignment of error is addressed to the refusal of the court to require the witness to reveal that information. It suffices to say that the nature of Mr. Pease's work had nothing to do with the basis of his testimony concerning Mrs. Kendall's character and reputation in her community. This assignment is overruled without further discussion.

Defendant's twelfth assignment of error argues the unconstitutionality of the death penalty. This point has already been the subject of final judicial determination in this State until and unless further review is required by legislative enactment or by the Supreme Court of the United States. State v Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973); State v Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974); State v Crowder, 285 N.C. 49, 203 S.E. 2d 33 (1974); State v Fowler, 285 N.C. 90, 203 S.E. 2d 803 (1974).

Examination of the entire record discloses that defendant received a fair trial free from prejudicial error. The verdict and judgments must therefore be upheld.

No error.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-63

JOHN R. STEGMANN,
Petitioner

-vs-

STATE OF NORTH CAROLINA,
Respondent

ON WRIT OF CERTIORARI
TO THE
SUPREME COURT OF NORTH CAROLINA

RESPONSE OF RESPONDENT,
STATE OF NORTH CAROLINA,
IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

CITATION TO OPINIONS BELOW 1

JURISDICTION 1

QUESTION PRESENTED. 1

STATEMENT OF CASE. 2

REASON FOR NOT GRANTING THE WRIT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAW OF NORTH CAROLINA VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES. 2

CONCLUSION 4

CERTIFICATE OF SERVICE 6

APPENDIX 1a

TABLE OF CASES

Fowler v. North Carolina,
No. 73-7031 (Oct. Term 1974) 2, 3

Furman v. Georgia,
408 US 238 (1972) 3

State v. Waddell,
282 NC 431, 194 SE 2d 19 (1972) 2, 3

State v. Woodson,
___NC___, ___SE2d ___(1975) 4

Statutes

H. B. 953, Chap. 749, (1975) N.C. Sess., ... 3, 4

N. C. Gen Stat. §14-21 (1974) 3

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RESPONSE OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 287 NC ____ (1975) and is appended to Petitioner's petition.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 USC §1257(3).

QUESTION PRESENTED

1. Whether the imposition and execution of the sentence of death for the crime of rape under the law of North Carolina violates the Eight or Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari to review the judgment of the Supreme Court of North Carolina, entered on April 1, 1975, affirming Petitioner's conviction and death sentence. Petitioner, John Richard Stegmann, was sentenced to die on May 16, 1974 in the Superior Court of Cumberland County, North Carolina upon conviction of the offense of rape. He was also sentenced to imprisonment for life upon conviction of the offense of kidnapping. Petitioner's sentence of death was imposed under North Carolina General Statute 14-21 as construed by the Supreme Court of North Carolina in *State v. Waddell, supra,* and related cases which are already before the court.

ARGUMENT

I

THE IMPOSITION AND EXECUTION OF THE SENTENCE OF DEATH FOR THE CRIME OF RAPE UNDER THE LAWS OF NORTH CAROLINA DOES NOT VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The petitioner asserts that the penalty of death is cruel and unusual punishment for non-injurious rape offenses. He also urges that the procedure through which the death penalty is applied under the law of North Carolina violates the Eighth and Fourteenth Amendments. Petitioner's assertions, in essence, question the propriety of the North Carolina Legislature to prescribe punishment. There is no valid reason for the Court to grant certiorari at this time to hear this question.

This Court granted certiorari to petitioner Jessie Thurman Fowler in the case of *Fowler v. North Carolina*, No. 73-7031 (Oct. Term, 1974) which, although a murder case, concerns both the issue of the constitutionality of the death penalty and the question as to whether penal policy is more appropriately to be reviewed by the Legislature than by the Judiciary. Extensive briefs were submitted in that case and oral

arguments were made before this Court on April 21, 1975. Hence, petitioner's question has, in essence, been accepted for hearing by the Court, and oral arguments before this Court have already been made. Therefore, any decision in this case should be dependent upon the outcome of the *Fowler* case, and the petition to grant certiorari should be denied.

Prior to the *Waddell* decision, under the North Carolina rape statute, (N.C.G.S. 14-21), the jury had the right to recommend life imprisonment for the capital crime of rape. *Furman v. Georgia, supra*, the Supreme Court of North Carolina ruled that the death penalty portion of the rape statute was constitutional, but the portion concerning the jury's discretion was not and that any person convicted of a capital offense prior to the *Waddell* decision and who had been sentenced to death, would have the sentence communted to life imprisonment. In all capital cases after *Waddell* the trial court was forbidden to allow the exercise of jury discretion in sentencing and upon conviction of a capital crime, the death sentence was mandatory. The rape statute was amended by the North Carolina legislature through the ratification of N.C.G.S. 14-21 (Supp. 1974) which divided the crime of rape into two categories, i.e., First and Second Degree Rape. But this enactment did not become effective April 8, 1974. Consequently, there existed a period of time between the decision in *Waddell* and the ensuing action of the Legislature, in which numerous individuals received death sentences under a statute which had been, in effect, established by the Judiciary rather than the Legislature.

In order to remedy this situation, the 1975 Session of the General Assembly of North Carolina enacted House Bill 953, a copy of which is appended to this response. This statute provides that defendants who have been convicted of rape committed after January 18, 1973, and prior to April 8, 1974, and who have had the verdict and sentence of death sustained on appeal, may apply to the judge who presided at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident Superior Court Judge of the judicial district in which the rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of N.C.G.S. 14-21 (Supp. 1974)

Whereas the date petitioner's conviction falls within the time span qualifying him for the special judicial determination provided by House Bill 953, the appellate channels which exist under North Carolina Law have not been totally exhausted by the petitioner. Therefore, the State would submit that the Petition for a Writ of Certiorari to the Supreme Court of North Carolina should be denied.

For the information of the Court in a very recent decision by the North Carolina Supreme Court, *State v. Woodson*, _____ NC ____, ____ SE 2d _____ (Filed June 26, 1975) held by a unanimous vote that the application of the death sentence pursuant to Chapter 1201, 1973, Session Law, ratified April 8, 1974, Codified as G.S. 14-17, which makes first degree murder committed after April 8, 1974 punishable by death not a violation of the cruel and unusual punishment clauses of the Constitution of the United States and North Carolina. Justice Exum in his concurring opinion clearly and distinctly succincently points out his personal opposition to capital punishment maintaining that it is not in his view a wise public policy, but that as a judge he does not feel that he can substitute his personal will for that of the legislature merely because he disagrees with its chosen policy.

CONCLUSION

It is therefore respectfully submitted that the question concerning the constitutionality of the death penalty as applied under the Law of North Carolina is already before this Court; and that the petitioner has not fully exhausted the channels for appellate review provided under North Carolina Law. The Petition for Writ of Certiorari to the Supreme Court of North Carolina should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am admitted to practice law before the Supreme Court of the United States; and that I have served three copies of the foregoing Response of the State of North Carolina in Opposition to Petition For Writ of Certiorari to the Supreme Court of the United States by depositing of the same to Counselor for the Petitioner properly addressed to Mr. Kenneth Glusman, Suite 704 Wachovia Building, Post Office Box Drawer 209, Fayetteville, North Carolina 28302; and depositing same in the United States Post Office at Raleigh, North Carolina, with first class postage affixed.

This the 29th day of July, 1975.

James E. Magner, Jr.
Assistant Attorney General

APPENDIX

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1975
RATIFIED BILL

Chapter 749

House Bill 953

AN ACT RELATING TO PUNISHMENT FOR RAPES COMMITTED PRIOR TO THE EFFECTIVE DATE OF CHAPTER 1201, SESSION LAWS OF 1973.

The General Assembly of North Carolina enacts:

Section 1. The provisions of G.S. 14-21, as rewritten by Section 2 of Chapter 1201 of the Session Laws of 1973, shall apply in all trials hereafter conducted for rapes committed after January 18, 1973, and prior to April 8, 1974, the effective date of Chapter 1201, Session Laws of 1973.

Sec. 2. (a) In cases in which the defendant has been convicted of a rape committed after January 18, 1973, and prior to April 8, 1974, and the verdict and sentence of death are or have been sustained on appeal, the defendant may apply once to the judge presiding at the rape trial resulting in the sentence of death, or, if said judge is unavailable, to a resident superior court judge of the judicial district in which said rape trial was held, to determine whether the defendant could have been punished by death had the rape been committed by him after the ratification of Chapter 1201, Session Laws of 1973.

(b) Said judge shall review a certified transcript of the evidence presented at trial (or if such transcript is not available, the record on appeal), make such independent investigation as he deems necessary to determine the age of the defendant or of the rape victim, and hear arguments or accept Briefs in behalf of the defendant and the State

(c) Thereupon, the judge shall determine the following question:

Is the evidence presented at the defendant's trial, plus additional evidence of the age of the defendant or the age of the rape victim, sufficient to submit the defendant's case to a jury on the charge of first degree rape as defined by G.S. 14-21(a), had the date of the rape been after April 8, 1974?

(d) If the question is answered in the affirmative, the defendant shall remain subject to the sentence of death. If the question is answered in the negative, the judge shall forthwith schedule a hearing for the presentation of evidence relative to resentencing the defendant; after the hearing, the sentence of death for rape previously imposed shall be vacated, and the defendant shall be resentenced as if he had been convicted of second degree rape for a rape committed after April 8, 1974.

(e) There shall be no right of appeal from the determination of the judge, but the Supreme Court of North Carolina may, upon petition for certiorari, allow review of said determination.

(f) In cases of resentencing, the defendant shall be allowed credit for time spent in custody awaiting the execution of the sentence of death.

Sec. 3. An indigent person under sentence of death for a rape committed after January 18, 1973, and before April 8, 1974, shall be entitled to counsel in making one application under this act for each such sentence of death, if he is otherwise entitled under Article 36 of Chapter 7A of the General Statutes of North Carolina.

Sec. 4 This act shall become effective upon ratification.

In the General Assembly read three times and ratified, this the 4th day of June, 1975.

/s/ James B. Hunt, Jr.
James B. Hunt, Jr.
President of the Senate

/s/ James C. Green, Sr.
James C. Green, Sr.
Speaker of the House
of Representatives